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No. 85-1372

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF OHIO, PETITIONER

v.

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency properly refused to redesignate Lorain County to attainment for ozone on the ground that emissions from that county contribute to the ozone nonattainment problem in the Cleveland urban area.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 7

Conclusion 14

TABLE OF AUTHORITIES

Cases:

American Textile Manufacturers Inst. v. *Donovan,* 452 U.S. 490 11

Cerro Copper Products Co. v. *Ruckelshaus,* 766 F.2d 1060 13

Chemical Manufacturers Ass'n v. *NRDC,* No. 83-1013 (Feb. 27, 1985) 8

Chevron U.S.A. Inc. v. *NRDC,* 467 U.S. 837 ..... 2, 6, 8, 9, 10

Illinois State Chamber of Commerce v. *EPA,* 775 F.2d 1141 ..... 10, 13

Mobil Oil Corp. v. *FPC,* 417 U.S. 283 11-12

Universal Camera Corp. v. *NLRB,* 340 U.S. 474 12

Western Oil & Gas Ass'n v. *EPA,* 767 F.2d 603 11

Page

Statutes and regulations:

Clean Air Act, 42 U.S.C. 7401 *et seq.* :

§ 107(a), 42 U.S.C. 7407(a) 2
§ 107(d), 42 U.S.C. 7407(d) 2, 4, 5
§ 107(d)(1), 42 U.S.C. 7407(d)(1) 2, 9
§ 107(d)(2), 42 U.S.C. 7407(d)(2) 3
§ 107(d)(5), 42 U.S.C. 7407(d)(5) 3
§ 108, 42 U.S.C. 7408 2
§ 109, 42 U.S.C. 7409 2
§ 110(a), 42 U.S.C. 7410(a) 2
§ 171, 42 U.S.C. 7501 2
§ 171(2), 42 U.S.C. 7501(2) 9
§ 172(a)(1), 42 U.S.C. 7502(a)(1) 2
§ 172(a)(2), 42 U.S.C. 7502(a)(2) 2
§ 172(b)(3), 42 U.S.C. 7502(b)(3) 3
§ 172(b)(6), 42 U.S.C. 7502(b)(6) 3
§ 172(b)(11)(B), 42 U.S.C. 7502(b)(11)(B) ... 3
§ 173, 42 U.S.C. 7503 3

Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.* 1

36 Fed. Reg. 22384 (1971) (codified at 40 C.F.R. Pt. 50) 2

44 Fed. Reg. 8202 (1979) (codified at 40 C.F.R. 50.9 (1984)) 4

Miscellaneous:

37 Fed. Reg. 10842 (1972) 2

43 Fed. Reg. (1978):

p. 45993 5

pp. 46015-46016 5

Page

Miscellaneous—Continued:

48 Fed. Reg. (1983):

p. 36272 6

p. 36275 5

49 Fed. Reg. 24124 (1984) 6

H.R. Rep. 95-294, 95th Cong., 1st Sess. (1977) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 776 F.2d 1333. The final decision of the Administrator of the Environmental Protection Agency (Pet. App. A15-A28) is published at 49 Fed. Reg. 24124.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 15, 1985. The petition for a writ of certiorari was filed on February 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, Congress established a combined federal and state program for the control and

abatement of air pollution. Sections 108 and 109 of the Act, 42 U.S.C. 7408 and 7409, provide for the Environmental Protection Agency (EPA) to establish primary and secondary national ambient air quality standards (NAAQS) to protect the public health and welfare. Sections 107(a) and 110(a), 42 U.S.C. 7407(a) and 7410(a), require each state to adopt, and to submit to EPA for approval, a "state implementation plan" (SIP) designed to attain and maintain the NAAQS within specified deadlines.

EPA promulgated NAAQS for several air pollutants in 1971. 36 Fed. Reg. 22384 (now codified at 40 C.F.R. Pt. 50). The states submitted the required SIPs shortly thereafter, and EPA generally approved them. See, *e.g.*, 37 Fed. Reg. 10842 (1972). Under the statutory schedule, states were (with limited exceptions) to attain the primary NAAQS by mid-1975. See generally *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 845-846 (1984).

In fact, however, many areas failed to attain the NAAQS despite the development and promulgation of the necessary SIPs. See H. R. Rep. 95-294, 95th Cong., 1st Sess. 207-208 (1977). In 1977, Congress added Part D to the Clean Air Act, 42 U.S.C. 7501 *et seq.*, to establish a new and more elaborate system of air quality planning for nonattainment areas. The 1977 amendments generally permitted extension of the deadline for attaining the NAAQS to December 31, 1982 (Section 172(a)(1), 42 U.S.C. 7502(a)(1)); if a state demonstrated that attainment of the photochemical oxidant or carbon monoxide NAAQS was not possible by that date despite the use of all reasonably available control measures, the deadline for those pollutants could be extended to 1987 (Section 172(a)(2), 42 U.S.C. 7502(a)(2)). See generally *Chevron U.S.A.*, 467 U.S. at 847-849.

The 1977 amendments also added subsection (d) to Section 107 of the Act, 42 U.S.C. 7407(d). Subsection (d)(1) directed the states to "submit to the Administrator [of EPA]

a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof," in which air quality (1) met the NAAQS (attainment areas), (2) did not meet the NAAQS (nonattainment areas), or (3) could not be classified for lack of information (unclassifiable areas). EPA was then required to promulgate the state lists "with such modifications as [the Administrator] deems necessary" (42 U.S.C. 7407(d)(2)). If the Administrator proposed to modify a state list, he had to notify the state, request "all available data," and provide the state with an opportunity to show why the proposed modification was "inappropriate" (*ibid.*). Subsection (d)(5) also permitted a state to revise and resubmit its lists to the Administrator for review and approval under these procedures.

In addition, the 1977 amendments required the states to submit comprehensive SIP revisions for nonattainment areas. The revised SIPs were to provide for annual incremental emission reductions sufficient to demonstrate "reasonable further progress" toward meeting the new deadlines. Section 172(b)(3), 42 U.S.C. 7502(b)(3). In particular, the revised SIPs had to provide for emission reductions from existing sources based on "reasonably available control technology" (*ibid.*), and to incorporate strict requirements governing the issuance of permits for the construction and operation of new or modified major stationary sources in the nonattainment area (Sections 172(b)(6) and 173, 42 U.S.C. 7502(b)(6) and 7503). Furthermore, revised SIPs for nonattainment areas with attainment date extensions beyond 1982, *i.e.*, those areas that had not attained the NAAQS for photochemical oxidants or carbon monoxide, had to establish schedules for implementing inspection and maintenance programs for motor vehicles. Section 172(b)(11)(B), 42 U.S.C. 7502(b)(11)(B).

2. Shortly after enactment of the 1977 amendments, EPA offered guidance to assist its regional offices and the states in preparing and reviewing the necessary nonattainment designations under the new Section 107(d). The guidelines noted that ozone[1] nonattainment areas should be of sufficient size to include most of the sources of significant impact and thus to allow unified treatment of the entire problem. See C.A. App. 19-23, 24-25, 26-27, 36-39.

EPA's directive on the designation of nonattainment areas for ozone reflected the scientific understanding of the process by which ozone is formed and transported. Unlike many other pollutants, ozone is not emitted directly into the atmosphere from an air pollution source. Instead, ozone is formed from substances known as ozone precursors, which are generally produced as a result of either fuel combustion or the use of organic chemicals in both stationary and mobile sources. Ozone precursors are released into the atmosphere and form ozone by undergoing photochemical oxidation reactions in the presence of sunlight. While in the atmosphere, ozone and its precursors are transported by the wind and can be carried considerable distances from the point of origin without significant dilution. See C.A. App. 212-214. Numerous monitoring studies conducted in major urban areas show that the point of maximum ozone concentration develops at a distance downwind from the city core area where the precursors originate. See C.A. App. 100-103, 104-118, 153-181, 217-229, 230-241, 250, 257-260. Because ozone is not emitted directly from sources but is formed

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[1]From 1971 to 1979, EPA applied an NAAQS for photochemical oxidants. In early 1979, EPA relaxed this standard and restated it to read exclusively in terms of ozone (rather than in terms of photochemical oxidants generally, which contain ozone as their major component). See 44 Fed. Reg. 8202 (1979) (now codified at 40 C.F.R. 50.9 (1984)). Ozone, which is a major component of smog, can cause serious respiratory problems.

from ozone precursors, and because ozone and ozone precursors are generally transported great distances, ozone pollution presents a regional rather than a local problem.

3. On October 5, 1978, EPA approved Ohio's status designations for ozone pursuant to Section 107(d) of the Clean Air Act. See 43 Fed. Reg. 45993 (1978). All of the counties in the Cleveland urban area, including Lorain, Cuyahoga, Lake, Medina, and Geauga Counties, were included in the Greater Cleveland Intrastate Air Quality Control Region and were classified as nonattainment for ozone. See 43 Fed. Reg. 46015-46016 (1978).

On November 22, 1982, Ohio requested that EPA revise the ozone designations of 46 counties, including Lorain, to attainment of the NAAQS for ozone. Lorain County lies immediately west and south of Cuyahoga County, in which the City of Cleveland is located; Cuyahoga County is designated nonattainment for ozone, and was not sought to be redesignated by Ohio's request. During the summer (when ozone formation is greatest), winds frequently originate from the southwest and thus blow from Lorain County into Cuyahoga and other counties in the Cleveland urban area.

On August 10, 1983, EPA published a notice of proposed rulemaking on Ohio's request for redesignation. See 48 Fed. Reg. 36275. In seeking public comment on EPA's review of the State's request, the notice proposed to approve the attainment designation for 36 counties and to retain the nonattainment redesignation for ten counties, including Lorain. EPA stated that while air quality data did not establish a violation of the ozone NAAQS in Lorain County, emissions of ozone precursors in the county represent a substantial portion of such emissions in the Cleveland urban nonattainment area and have a significant impact on ozone levels in Cuyahoga and other counties in the downwind Cleveland urban area for which the ozone

NAAQS had not been met. See 48 Fed. Reg. 36272 (1983). On that basis, EPA proposed that Lorain County should remain nonattainment for ozone.

Following public notice and comment, EPA took final action approving Ohio's redesignation of 37 counties as attainment for ozone and disapproving the State's request to redesignate nine other counties, including Lorain. See 49 Fed. Reg. 24124 (1984) (Pet. App. A15-A28). In its comments on the proposed rulemaking, Ohio conceded that emissions from Lorain County contribute to ozone concentrations in the Cleveland area that exceed the NAAQS (*id.* at A4).

4. The court of appeals denied Ohio's petition for review and upheld EPA's decision not to redesignate Lorain County as attainment for ozone (Pet. App. A1-A13). The court first held that EPA had acted within its statutory authority in defining a nonattainment area for ozone to be the urban area that includes both the locations that exceed the NAAQS and the locations that are the origin for a substantial portion of the ozone pollutants (*id.* at A8-A13). Relying on *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court found that the Act did not express a definition of the relevant "area" for nonattainment purposes and that EPA's position was based on a reasonable construction of the statute:

> It appears a permissible exercise of this authority [to pass upon redesignation requests] for EPA to deny redesignation with respect to a component of a nonattainment area which produced a substantial portion of the area's pollution even though the air within that component tests at an acceptable level. If it were otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by

> prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for attacking pollution in the area of which the county is logically a part.

Pet. App. A10-A11.

The court of appeals also concluded that under this standard EPA had properly retained Lorain County in the Cleveland urban nonattainment area. As the court explained, the record establishes that significant quantities of ozone precursors are emitted from sources in Lorain County; that tests in a number of urban areas show that ozone precursors are carried long distances in the atmosphere and then are converted to ozone in that distant location; that meterological data in the record demonstrate that during the peak ozone periods the prevailing winds blow from Lorain County into Cuyahoga and other counties that have not achieved the NAAQS; and that Ohio conceded that pollutants from Lorain County contribute to Cleveland's ozone problem (Pet. App. A7-A8, A13). Finally, the court found that it was not arbitrary for EPA to redesignate Medina County but not Lorain County since, in contrast to heavily industrialized Lorain, Medina is a largely rural area that contains only scattered sources of pollution and has insignificant levels of emissions (*id.* at A13).

Judge Wellford concurred. While joining the majority's "able analysis of the issues in this case," he wrote "separately only to bespeak my dissatisfaction with EPA's failure to conduct measurements of the wind-factor effect in the Cleveland area of emissions from Lorain County," which "would certainly have made this case less difficult in disposition" (Pet. App. A14).

ARGUMENT

1. Ohio contends (Pet. 11-16) that EPA's denial of its request to redesignate Lorain County to attainment status was inconsistent with the Clean Air Act. The court of

appeals correctly rejected Ohio's argument, and this ruling does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

In *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), this Court recently set forth the standard for judicial review of an agency's interpretation of a statute that it administers (467 U.S. at 842-843 (footnotes omitted)):

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

In applying this standard, the reviewing "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding" (467 U.S. at 843 n.11); rather, it is enough that the agency's interpretation "is a reasonable one" (467 U.S. at 845). And "the principle of deference to administrative interpretations," which accords "considerable weight" to the agency's construction (467 U.S. at 844), has especial application to statutes like the Clean Air Act that are "lengthy, detailed, technical, [and] complex" (467 U.S. at 848). See also, *e.g.*, *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9.

As the court of appeals correctly recognized, the Clean Air Act "does not speak directly to the precise question" presented in this case (Pet. App. A9). Nothing in the Act requires that each individual county in an urban area be considered separately and in isolation in determining whether compliance with an NAAQS has been achieved. Nor does the statute require EPA to ignore the fact that ozone and ozone precursors in one county are transported into other counties that exceed the NAAQS for ozone.

Ohio argues that Section 107(d)(1) of the Clean Air Act, 42 U.S.C. 7407(d)(1), requires EPA to redesignate a county as attainment if the air quality in the county meets the NAAQS. However, Section 107(d)(1)—which refers to "air quality control regions, or portions thereof, * * * which * * * have ambient air quality levels better than [the NAAQS]"—does not mention counties or otherwise identify the "portion[]" of an air quality control region that EPA should consider in its designation of attainment. Likewise, the definition of "nonattainment area" in Section 171(2), 42 U.S.C. 7501(2), upon which Ohio also relies, does "not directly deal[] with the question posed by this appeal" (Pet. App. A10). That provision defines what is meant by "nonattainment" but does not specify the "area" for which the nonattainment determination is to be made. Cf. *Chevron U.S.A.*, 467 U.S. at 860 (definition of "major stationary source" addresses the meaning of "major" but not of "stationary source").

Ohio also complains about the pollution control requirements it must meet under EPA's construction and objects that they "may or may not be the most efficient and effective means of controlling emissions which contribute to the formation of ozone" (Pet. 14). As the court of appeals explained (Pet. App. A10-A11), however, it was reasonable

> for EPA to deny redesignation with respect to a component of a nonattainment area which produced a substantial portion of the area's pollution even though the air within that component tests at an acceptable level. If it were otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for attacking pollution in the area of which the county is logically a part.

In effect, Ohio seeks to challenge the pollution control requirements of the Clean Air Act and the desirability of EPA's chosen means for implementing the statutory program. This argument, which "really centers on the wisdom of the agency's policy, * * * must fail" (*Chevron U.S.A.*, 467 U.S. at 866).

The decision below is also consistent with the decisions of other courts of appeals on this issue. In *Illinois State Chamber of Commerce* v. *EPA*, 775 F.2d 1141 (7th Cir. 1985) (Pet. App. A29-A62), the court recognized that EPA's approach was within its statutory authority and reasonably effectuated the purposes of the Clean Air Act:

> The current state of scientific knowledge suggests that it would be worse than foolish to start with geographically small areas, for ozone, and then base the attainment status of each area on the monitoring of ozone within that area. Attainment and nonattainment are meant to reflect the contribution of an area to the pollution problem; and perhaps the *worst* way to determine the contribution of a small area to the ozone problem is to measure for ozone within the area itself. It cannot have been the intention of Congress that EPA choose the worst possible way to measure for the production of pollutants * * *.

* * * * *

> [C]ertain controls apply to nonattainment areas by operation of the statute. It is essential to the success of the Clean Air Act that these controls apply in the appropriate areas, and we refuse to construe the law in such a way that the controls will apply to areas that suffer from but do not produce ozone pollution but not to areas that produce but do not suffer from such pollution.

Pet. App. A45-A46, A48-A49. Similarly, in *Western Oil & Gas Ass'n* v. *EPA*, 767 F.2d 603 (9th Cir. 1985), the court concluded that the Clean Air Act "provide[s] for considerable EPA discretion in designating area boundaries large enough to achieve the purposes which underlie the classification scheme" (767 F.2d at 606), and that it was "common sense" and not "in excess of statutory authority" (767 F.2d at 607) for EPA to include with the nonattainment area the sources of ozone precursors that contribute to the pollution problem in the urban region.[2]

2. Ohio also contends (Pet. 6-10) that EPA's denial of redesignation in this case was not adequately supported by the rulemaking record. However, as Ohio's discussion itself makes clear, the standard for judicial review of agency decisions is well settled, and the question whether the court of appeals properly applied that standard in this case presents only a fact-bound issue that does not warrant the grant

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[2]Ohio's asserted grounds (Pet. 15 n.6) for distinguishing *Western Oil & Gas Ass'n* are unavailing. First, the fact that that case involved an initial designation rather than a redesignation is simply irrelevant, since, by Ohio's own admission (Pet. 12), the same standards apply to both determinations. Furthermore, the fact that the state supported EPA's designation in that case does not advance Ohio's argument that the statute on its face requires a county meeting the NAAQS to be designated as attainment regardless of its contribution to pollution problems in the rest of the urban area.

of certiorari. See, *e.g., American Textile Manufacturers Inst.* v. *Donovan,* 452 U.S. 490, 523 (1981); *Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

In any event, the court of appeals correctly upheld EPA's determination. The rulemaking record demonstrates that significant quantities of ozone precursors are emitted from sources in Lorain County and that the prevailing winds blow from Lorain to Cuyahoga and other counties during the peak ozone season (Pet. App. A8). In addition, studies in other urban areas show that ozone precursors are carried long distances in the atmosphere before they are converted into ozone (*id.* at A13); as the court of appeals found, these tests "were sufficiently similar to form a reliable basis for concluding that the same condition would occur in Cleveland" (*ibid.*). And it is undisputed that Cuyahoga County—for which Ohio did not even seek redesignation—is out of compliance with the ozone NAAQS (*id.* at A3, A11). Based on these factors, the court of appeals properly concluded that "[t]he technical materials in this record support the conclusion that the contribution of Lorain County's emissions to the Cleveland ozone problem is significant" (*id.* at A13). In fact, "Ohio admitted on the record that emissions from Lorain [C]ounty contribute to the ozone concentrations in the Cleveland area" (*ibid.*), which by itself serves to establish that EPA did not act in an arbitrary and unsupported fashion.

Ohio argues (Pet. 10) that the record was inadequate because the studies on the transportation of ozone precursors and the formation of ozone did not specifically relate to the Cleveland area. However, these studies were used here for their treatment of general scientific principles and provided a reliable basis for applying their findings in this case (Pet. App. A13); thus, "the fact that EPA did not conduct measurements of the wind-factor effect in the Cleveland

area is [not] important" (*ibid.*).[3] Ohio further asserts (Pet. 9) that it was irrational for EPA to redesignate Medina but not Lorain County as attainment for ozone. The court of appeals correctly rejected this assertion, noting that "Lorain County is heavily industrialized while Medina County is largely rural" and that "compared with the emissions from Lorain County * * * those from Medina County are insignificant" (Pet. App. A13).

Finally, contrary to Ohio's contention (Pet. 5-8), the decision below does not conflict with the Seventh Circuit's decision in *Illinois State Chamber of Commerce* v. *EPA, supra.* In that case, a divided panel set aside EPA's decision not to redesignate certain counties in Illinois as attainment for ozone on the ground that the agency had "not made clear the rationale for its action" (Pet. App. A49). Accordingly, the court remanded "for reconsideration by EPA and for clarification of the grounds upon which it has dealt or will deal with the Illinois request" (*id.* at A49-A50). Nothing in *Illinois State Chamber of Commerce* suggests that the Seventh Circuit applied a different standard of review than the one followed by the Sixth Circuit here,[4] and the court's remand for clarification of that record does not conflict with the decision below that the entirely distinct record in this case was adequate to sustain EPA's action. Ohio's claimed conflict represents nothing more than the application of settled legal standards to the different factual records in the two cases.

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[3]Ohio also relies on the concurring opinion of Judge Wellford, who expressed his belief that such measurements "would certainly have made this case less difficult in disposition" (Pet. App. A14). Notwithstanding his "dissatisfaction" (*ibid.*), however, Judge Wellford concurred in "the able analysis" (*ibid.*) and judgment of the court.

[4]See also, *e.g., Cerro Copper Products Co.* v. *Ruckelshaus,* 766 F.2d 1060, 1066-1067 (7th Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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